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In the

Supreme Court of the United States

October Term, 1992

Florence County School District Four, et al.,

Petitioners,

v.

Shannon Carter, By and Through Her Father and Next Friend, Emory Carter,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION AND THE NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION IN SUPPORT OF PETITIONERS

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association (NSBA)
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

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This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

INTEREST OF THE AMICI

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

Each of the approximately 16,000 school districts which NSBA represents receives or is eligible to receive financial assistance under the Individuals with Disabilities Education Act, 20 U.S.C. § 1401 et seq. (hereinafter designated as IDEA or the Act). The subject of this case is of great importance to school districts across the country from both an educational and financial perspective.

The National Association of State Boards of Education (NASBE) is a nonprofit, private organization representing state and territorial boards of education in national issues and assists the boards in the fulfillment of their duties.

NASBE's objectives are to promote excellence in the education of all students and equality of access to educational opportunity; to strengthen leadership in education policy making and to assure responsible lay governance of public education.

NASBE's interest in this case is the integrity of the state standards for approval of private schools providing special education. These procedural and substantive standards are adopted by state boards of education to protect the educational welfare of children. A public school cannot place a child in a private school unless the school is approved as meeting the state standards. If

the decision of the Court of Appeals for the Fourth Circuit is upheld it would eliminate any requirement or incentive for private schools to comply with state standards if the child is placed in the private school by a parent, rather than a school district.

NASBE is committed to quality education for all children and believes allowing state reimbursement for parental placement of children in nonstandard private schools would not be in the best educational interests of children with special needs.

STATEMENT OF THE CASE

Amici incorporates by reference thereto the statement of the case contained in brief filed herein by Petitioners.

ARGUMENT

Introduction

The court below correctly stated that this Court held in Burlington School Committee v. Department of Educ. of Massachusetts, 471 U.S. 359 (1985), that a parent who

unilaterally places a child in a private school has a right to reimbursement of the expenses of the school if the public placement was inappropriate and the private placement was appropriate. The lower court, however, ignored the standards set by Congress and this Court for determining what is appropriate in favor of the lower court's own standard. It has, therefore, disregarded the fact that the private school does not meet the state's educational standards.

Congress has designated the states as the enforcement officers for the IDEA to assure that all children with disabilities in their respective states are provided a "free appropriate public education" (FAPE). State standards provide an objective baseline from which determinations can be made as to whether a specific placement provides a free appropriate public education to an individual child. However, a school which does not meet state standards developed pursuant to the IDEA

falls below this baseline and therefore cannot meet the IDEA requirement of a "free appropriate public education."

Not only is Petitioner not required to reimburse Respondents for the expenses of an education that does not meet state education requirements, and thus does not meet the requirements of the IDEA, Petitioner is prohibited from using IDEA funds for that purpose.

A recent commentary on the decision below provides an excellent summary of its problematic nature.

> [The placement of Shannon by her parents in an unapproved private school] not only runs afoul of the specific language of the IDEA, it also raises issues of basic fairness with respect to the public school district's financial responsibility. Moreover, the ultimate goal of the IDEA -- providing an appropriate educational experience for disabled children -- is at risk if state educational standards are disregarded. . .
>
> Burlington attempted to accommodate the interests of all concerned parties -- parents, children, and public school officials -- in its decision to uphold reimbursement for parents' unilateral private school placements. The courts should draw the line at state-approved private schools, particularly if parents and school officials are to be encouraged to work together in a cooperative effort.

Parkingson, J., Private School Placement of a Disabled Child in an Unapproved Private School: A "Free Appropriate Public Education"?, 76 Educ. L. Rep. 893, 911-912 (1993).

I. The decision below ignores both the requirements of the Act and this Court's decision in Hendrick Hudson v. Rowley and substitutes its own educational standards for that of the State.

In 1982 this Court handed down its first decision interpreting the IDEA (then known as the Education for All Handicapped Children Act). Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). In ruling against the plaintiffs who sought a sign language interpreter for their deaf child who was currently being educated in the regular classroom through the use of a hearing aid,

the Court considered two questions: "What is meant by the Act's requirement of a 'free appropriate public education?' And what is the role of state and federal courts in exercising the review granted by 20 U.S.C. 1415?" 458 U.S. at 186. The Court's answers to those questions confirm that the decision below is both educationally unsound and legally insupportable.

A. "Free appropriate public education" (FAPE) is defined in the Act rather than by decisions of lower courts.

In Rowley this Court disagreed with the plaintiff who argued that the Act provides no workable guidance in defining "free appropriate public education" (FAPE), thereby freeing the courts to make that decision. The Court also criticized the dissent which would "give the courts carte blanche to impose upon the States whatever burden their various judgments indicate should be imposed." 458 U.S. at 190 n. 11. Although Congress provided highly specific procedural safeguards in the

Act in contrast to the somewhat imprecise substantive standards, the Court noted that Congress did indeed provide guidance on the meaning of FAPE through its definition of the term.

> It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define "free appropriate public education":
>
> "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program [known as the IEP] required under section 1414(a)(5) of this title."

Id at 187-88 (Court's emphasis). The Court pointed out that nothing in the Act evidences a Congressional intent to develop a substantive standard. The emphasis is on process, with the State being required to adopt procedures to assure that each disabled

child receives individualized consideration and instruction. After approval by the U.S. Department of Education, those rules and procedures are imposed by the State on the local educational agencies.

The lower court in the case at bar, however, ignored the entire procedural scheme of the Act, apparently deeming it irrelevant to a consideration of whether Shannon was provided FAPE through her enrollment in Trident Academy. The lower court admitted that two of the four components of Congress' definition of FAPE were missing at Trident Academy, i.e., subparagraph (B)'s condition that the education meet state standards and subparagraph (D)'s condition that the education be provided in accordance with the provisions of the child's IEP. The court casually noted that the school district followed all of the procedural requirements of the Act and that Trident "does not attempt to comply with the terms of the Act," but the

court apparently deemed those facts unimportant. Florence County School Dist. Four v. Carter, (4th Cir.), Petition for Certiorari at 11a. In its discussion of the definition of FAPE, this Court stated:

> Almost as a checklist for adequacy [of FAPE] under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels under the State's regular education, and comport with the child's IEP.

458 U.S. at 189. This Court reiterated the list quoted above in its discussion of what the state must do to satisfy the FAPE requirement. Id. at 201.

In addition to the definitional requirements of FAPE, the Court also discussed Congress' acknowledgement of the importance of training and use of experts in assuring that each child is provided FAPE. For example, the Court cited the Act's requirement that States create an advisory committee of experts in the

field to comment on state rules and regulation under the Act. Id. at 209, n.31. Yet the court below held that it is irrelevant to a claim for reimbursement that Trident Academy does not attempt to follow those rules and regulations.

This is not a case of a minor violation of some aspect of IDEA's procedural safeguards, which would not necessarily call into question the appropriateness of the educational program of a child. Nor is this a situation where a school, which is in substantial compliance with state standards and is subject to state monitoring, violates a minor aspect of state standards. What we have here is not a mere technical violation of state standards. Parents are asking for reimbursement of tuition and costs for an educational program that does not even come close to meeting the requirements of the IDEA. Respondents do not dispute that Trident does

not attempt to follow IDEA procedures in any respect.

Trident has made no attempt to comply with state standards even in some of the most important areas such as teacher certification. This Court in Rowley cited legislative history of the Act stating that "handicapped children . . . are denied access to public schools because of a lack of trained personnel." 458 U.S. at 191, n.13. The Act addresses that concern through its requirement that state plans include a "comprehensive system of personnel development." 20 U.S.C. § 1413(a)(3).

The U.S. Department of Education's original discussion of the requirement in Appendix A to its regulations under the Act states:

> The statute is very clear in requiring that a "comprehensive system of personnel development" be implemented in each State. Since this is a broad requirement, challenging each State to reach out to the expansive community of

> agencies involved in preparing personnel to educate the handicapped, many of which are private and not under the control of the State, it was felt that a regulation was needed that would provide sufficient information for the State and involved agencies to understand their responsibilities in achieving compliance.

42 Fed. Reg. 42, 509 (Aug. 23, 1977). 34 C.F.R. 300.381 requires that state plans describe the personnel development system which must include "procedures and activities a State will undertake to insure an adequate supply of qualified personnel. . ." 34 C.F.R. 300.15 defines the circumstances under which a person is deemed to be "qualified" as those individuals who have "met State educational agency approved or recognized certification, licensing, registration or other comparable requirements that apply to the area in which he or she is providing special education or related services." This provision is consistent with the Act which also calls for

establishment of state standards for special education personnel. 20 U.S.C. § 1413(a)(14).

The State of South Carolina adopted a comprehensive system of personnel development which was approved by the U.S. Department of Education as meeting the requirements of IDEA. Yet the lower court in the case at bar deemed it irrelevant that at least one of Shannon's teachers was not certified under the rules and regulations of the state.

Trident's failure to meet FAPE requirements even extends to failure to provide IEPs. The IEP requirement which is also included in the Act's definition of FAPE has been described by this Court as the "centerpiece of the statute's education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311 (1988). In Burlington the Court characterized the IEP as the "modus operandi" of the Act. Yet the lower court in this case held that Trident's failure to develop IEPs for its students is of

no consequence in determining liability of the school district for reimbursement.

Respondents' request for reimbursement is made pursuant to the IDEA. The funds for the reimbursement would be paid in part out of the proceeds of grants made under the IDEA. Yet the lower court reached the bizarre conclusion that failure to comply with Congress' conditions of the grant is "not fatal to the request for reimbursement."

Congress placed on the states the responsibility to monitor compliance with IDEA. Yet the State in this case has not had the opportunity to monitor Trident's educational program. The U.S. Department of Education financed a recent national study of separate day and residential facilities that serve children with disabilities. U. S. Department of Education, Thirteenth Annual Report to Congress on the Implementation of The Individuals with Disabilities Education Act (1991) 86. The study found that state

compliance monitoring is one of the best methods available to States to determine educational program effectiveness and developing training and technical assistance to upgrade educational programs for children with disabilities. In this case, no such monitoring took place. The school district cannot be expected to pay for the education of a child in a school over which neither it nor the State had jurisdiction to monitor compliance -- even if a court, using its own educational standards, determines after the fact that the education received by the child was "appropriate."

B. It is not the role of the courts in reviewing FAPE, to substitute their own judgment for that of education officials.

The second question addressed by the Court in Rowley relates to the role of lower courts in reviewing the actions of the state or the school district. The lower court's

holding also fails to meet the standards set by this Court in this regard.

> [T]he provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought.

458 U.S. at 207.

The lower court, in effect, has "certified" Trident as an appropriate placement under the Act, through the application of its own educational standards. The lower court has cavalierly awarded reimbursement to Respondents out of funds appropriated by Congress, while totally ignoring the conditions placed by Congress on that appropriation.

The lower court noted that the educational program at Trident "in many ways

parallels" what is required by the IDEA. That is an educational determination. In a given case, state educational experts might decide that a private school's program is educationally sufficient to meet state standards even though certain technicalities are not met, but that is the role of the educators, not the courts. For example, the lower court noted that at least one of Shannon's teachers does not meet South Carolina's certification requirements. If that fact is educationally irrelevant, that is a decision to be made by educators, not courts.

The lower court cited Rowley for the proposition that the education is "appropriate" if it is "reasonably calculated to enable the child to receive educational benefits." If that was all that Congress or this Court intended to require, the Act would have been a paragraph long instead of containing "elaborate and highly specific,"

requirements as to the process for developing and implementing education programs for children with disabilities. Rowley, 458 U.S. 205. Educational benefit is only half of what this Court deemed in Rowley to be the proper inquiry of a court:

> Therefore, a court's inquiry is twofold. First, has the State complied with the procedures set forth in the Act? And second is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 207. Furthermore, since an IEP was not developed for Shannon, even the second half of this analysis cannot have been met since "educational benefit" is determined by examining the IEP.

The lower court apparently believes that if a school district fails to provide FAPE then "all bets are off." The parents are free to enroll their child in any school they want without restriction on either the parents or the school. Presumably, a child could even be

placed in a "home school" under the lower court's analysis, and the school district could be held liable for the reasonable costs of education at home. Under the lower court's reworking of the Act, if a court later determines, by applying educational standards developed by the court and through the use of court appointed experts, that the private school provided the child an "appropriate" special education, the public school must reimburse the parents for expenses. Carter v. Florence County School Dist. Four, (D.S.C.) Pet. for Cert. Appendix 29a. This is a dangerous precedent which is not educationally sound.

The IDEA was designed to assure access to publicly financed education. It was not designed to mandate that public school districts finance the education that the parents of a child with a disability and the courts deem is best for the child without regard for compliance with state education

standards. That standard was expressly rejected by this Court in Rowley.

> Congress' desire to provide specialized educational service, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States.
>
> The [lower courts] erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S. at 200-201.

II. School districts are obligated under the IDEA to pay the costs of private schooling for disabled students only where the students are placed in the school for the purpose of compliance with the IDEA.

Although the IDEA requires school districts to provide services to all students with disabilities who are enrolled in private schools, the extent of the obligation depends on the reason the child is enrolled in the

school. Where the parents place the child in a private school for their own reasons, the obligation extends only to allowing the child to participate in the special education program of the school district.

20 U.S.C. § 1413(a)(4)(A) provides that the plans which the Act requires to be developed by all states participating in the funding program, must set forth policies and procedures to assure:

> that to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under the subchapter by providing for such children special education and related services.

Under this provision, the school district must make special education available to the child on the premises of either the public or private school (in cases involving religious schools the latter option may not be available), but it is not required to pay the

tuition or other costs of the private school.

> If [the parents choose to place their child in a private school rather than take advantage of the free public education] the Act does not require the State or local educational agency to bear the cost of the private school. For children placed in private schools by their parents, the State and its local educational agencies have a different duty. They must design their program so that handicapped children in those private schools can participate in special education and related services offered by the local educational agencies if the parents of those children so desire.

Appendix A to U.S. Department of Education Regulations Implementing Part B of the Education of the Handicapped Act, 42 Fed. Reg. 42, 510 (Aug. 23, 1977).

20 U.S.C. § 1413(a)(4)(B) provides that where the child is placed in or referred to the private school "by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter," expenses of the private school must be paid by the state or school district. This is the only provision under which parents

would be entitled to reimbursement for private school tuition and costs. Shannon was not "placed in or referred" to Trident. However, since the lower court held that the public school placement was "inappropriate"[1], Shannon's parents were allegedly forced to enroll her in a private school in order to receive FAPE. In accordance with this Court's decision in Burlington, where the public placement is inappropriate, the parents may place the child in a private school as the means of carrying out the terms of the Act and that placement will be treated in the same manner as if the school district had placed the child in the school. Since the school district is not eligible for funding under the

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[1] This Court agreed to review only the second issue presented in the petition for certiorari. Had the Court granted review on the other issue, Amicus would have expressed its strong disagreement with the holding below in which the court substituted its own judgment for the judgment of the educational experts regarding the appropriateness of educational goals set for Shannon. Amicus respectfully requests this Court to state in its decision that it does not necessarily agree with the lower court's decision as to the appropriateness of the public placement.

IDEA where the education provided is not in compliance with the requirement of the Act, similarly, parents are also not eligible for reimbursement under those circumstances.

If the parents placed the child in the school in order to carry out the terms of the Act, the chosen school must meet the terms of the Act. The lower court expressly found that Trident Academy does not meet the terms of the Act. If the parents placed the child in the school for some other reason, the child is entitled to special education and related services, but the school district is not responsible for the costs of the private school. Nothing in the Act, either expressly or implicitly, allows IDEA funds to be expended for private school expenses where the school does not meet the requirements of the Act.

III. Education of disabled students in a private placement is substantially more expensive than education in a public placement and public funds should not be expended for private placements unless the placement is in accordance with the IDEA.

This case is extremely important to school districts across the country because of its financial implications. Private schools are usually substantially more expensive than public placements, particularly when compared to a "mainstreamed" or partially mainstreamed public environment. In 1989 the U.S Department of Education reported to Congress that the average per-pupil education expenditure for special education and related services in a school district resource program is $2398; in a self-contained program in school districts it is $5700, whereas the average per pupil expenditure for private residential programs is $31,616 (includes residential costs.) U.S. Department of Education, Eleventh Annual Report to Congress on the Implementation of The Education of the

Handicapped Act 119, 127 (1989). All of these figures compare with the average total cost of $2780 for a student who spends full time in the regular education program. Id. at 147.

When the Education of the Handicapped Act (now Part B of IDEA) was passed in 1975, Congress made the commitment to provide states with 40% of the national average per pupil expenditure for each eligible child to be used to defray the "excess costs" associated with meeting the educational needs of a child with a disability. Unfortunately, Congress has never come close to meeting that promise. Funding for the program has never exceeded 12% of the national average per pupil expenditure -- currently funding equals only 7%. U.S. Dept. of Education, Justification of Appropriation Estimates to the Congress Fiscal Year 1993 F-19 (1992). Special education expenditures have risen from approximately $11.75 billion in 1982-83 to over $16 billion in 1986-87, with the federal government

picking up only slightly more than $1 billion. Statement of the Ad Hoc Coalition to Increase Federal Funding for the Education of Children with Disabilities, issued Spring, 1992 by the National School Boards Association, American Association of School Administrators, Council for Exceptional Children, National Association of State Directors of Special Education, National Association of State Boards of Education and National Parent Network on Disabilities.

A survey of 18 states conducted by the National Association of State Directors of Special Education showed that although the number of special education students increased from approximately 6% over the period from fiscal 1985 to fiscal 1991, state special education expenditures increased in those states by nearly 70%. The cost of private placements was a major contributor to this increase.

The combination of inordinate expense of special education together with the increase in societal pressures on the educational system (e.g. the increase in families living in poverty,[2] the effects of alcohol/drug dependency and the increase in populations of immigrants[3]) together with a higher increase in the inflation rate for schools[4] threatens to overload the public education system in many states and localities. Under such circumstances, school districts should not be forced to spend public funds on private schools that do not meet state educational standards.

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[2] In 1985, 12.5 million children were classified as living in poverty. The proportion has risen from 1 in 8 during the 1970s to 1 in 5.1. Robinson, G. and Protheroe, G., Cost of Education, 82.

[3] Projections show the number of limited English proficient children (ages 5 to 14) increasing 16.7% between 1980 and 1990, and increasing 41.7% between 1980 and 2000. Id.

[4] A School Price Index, developed in 1975, demonstrated a more rapid rate of inflation for the special mix of goods and services unique to education for the period from 1975 to 1986 than the Consumer Price Index, 132.4 points as compared to 110.1 points. Id. at 27.

Conclusion

Amici urges this Court to reverse the decision of the lower court and direct the court to enter judgment for the Petitioners.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record
Deputy General Counsel
National School Boards
Association (NSBA)
1680 Duke Street
Alexandria, VA 22316
(703) 838-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director